No. SC85936

THE SUPREME COURT OF THE STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent/Plaintiff	)	
	)	
vs.	)	**Case No. SC85936**
	)	
ALINE J. POWERS,	)	
	)	
Appellant/Defendant	)	

Appeal From The Circuit Court of The County of St. Louis
Hon. David Lee Vincent, III
Circuit Judge

SUBSTITUTE REPLY BRIEF

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II.

Reply Argument

Reply To Respondent's Brief Point I

(1) State's Argument Is Not Supported By The Record On Appeal

In a flawed attempt to justify the foundational requirements for the admission of State's Exhibit 1 and State's Exhibit 1A, Respondent's Statement, Brief And Argument ("State's Brief") repeatedly misstates the factual record on appeal, to wit:

- State's Mischaracterization of Toppett's Monitor Observations : "Toppett Personally Observed The Events Depicted On The Tapes" [State's Brief, Point p.9 ¶1]; "In the present case, Toppett personally observed the events as they were happening and the best evidence rule did not apply" [State's Brief, p. 25 ¶3]; "Toppett's testimony was based on his personal observations and was not hearsay" [State's Brief, p.24 ¶2]; "...the fact that Toppett observed appellant's actions on a monitor as the events unfolded did not change the personal nature of his observations" [State's Brief, p.24 ¶3]; "Toppett observed the events as they were happening, in real time." [State's Brief, p. 13 ¶2] .
- State's Mischaracterization of Toppett's "Testing" of Recording Equipment : "... he (Sic: Toppett) tested the surveillance by playing back the surveillance tape from the previous day ... Toppett testified that the equipment was functioning properly and that he placed a blank tape to record the surveillance May 28."[State's Brief, p. 10 ¶1];"... he (Sic: Toppett) tested it on the day of the crime and determined that the equipment was operational" [State Brief, P. 14 ¶1].
- State Falsely Claims State's Exhibit 1A Contains All State's Exhibit 1 Scenes of Powers: "According to Toppett, he and Schrader selected the views to be recorded (Sic: dubbed) on the duplicate (Sic: State's Exhibit 1A), which included only the views on which appellant (Sic: Powers) appeared."[State's

Brief, p. 11 ¶2]; "The state in the present case did not introduce only selected portions of appellant's acts (Sic: through State's Exhibit 1A), but showed appellant's entire conduct captured on the surveillance tape (Sic: State's Exhibit 1)"[State's Brief, p. 20 ¶2].

- State Mischaracterized Basis For Powers Foundational Objections : "Appellant further claims that Toppett could not lay a proper foundation for the admissibility of the tapes because he was not a mechanic" [State's Brief, p. 13 ¶3].

Objectively, these erroneous conclusions are each necessary for The State to avoid reversal and remand in this appeal.

In retrospect, as set out in Powers Application For Transfer to this Court, the issues presented are of first impression in Missouri ... namely, (i) whether testimony predicated solely upon observations from a T.V. security monitor [without personally observing the T.V. displayed events first hand], and without any evidence to show the trustworthiness of the mechanically displayed reproduction, is a sufficient, competent foundation to admit into evidence a videotape of the events portrayed on the T.V. monitor, (ii) whether the videotape is inadmissible hearsay or (iii) whether Toppett's testimony, based solely upon the content of State's Exhibit 1 [the original surveillance tape as viewed on the security office monitor], violates the Best Evidence Rule and Hearsay Rule ?

(2) Toppett's Observations Are Insufficient To Lay Proper Foundation :

The nexus of The State's erroneous argument is revealed in the following statement made at State's Brief, page 24 ¶3: "...the fact that Toppett observed appellant's actions on a monitor as the events unfolded did not change the personal nature of his observations".

But, that's the very issue involved in this appeal ... is it "personal" or is it "second-hand" hearsay observation ?

The State relies upon People v. Tharpe-Williams, 286 Ill.App.3d 605 , 676 N.E.2d 717 (Ill. 2nd App. 1997)("Tharpe-Williams") in arriving at its' "personal observation" conclusion.

The State misinterprets Tharpe-Williams. See, Appellant's Substitute Brief (6/14/04), pages 31-33.

Tharpe-Williams specifically held :

> "Of course, a witness' testimony regarding what he observed while viewing a contemporaneous, live telecast of an incident requires foundational proof that the video system was functioning properly. Defendant, however, does not, and did not before the trial court, maintain that the video system in this case was functioning improperly on the day of the incident. Accordingly, we need not consider whether a proper foundation was laid for Berg's and Pinneke's testimony regarding what they observed on the video monitor". Id. at 609-610 (Emphasis supplied).

That's what distinguishes the Tharpe-Williams "personal observation" conclusion with the facts in this appeal ... here, Powers from the beginning attacked the adequacy

of the foundational evidence for the admission of State's Exhibit 1, State's Exhibit 1A and the T.V. monitor images viewed by Toppett.

Of course, if The State offered sufficient evidence to show the monitoring and recording equipment was operating properly and recording all the events as they occurred in "real time", then we would have a Tharpe-Williams situation.

But that's not the situation in the case *sub judice*.

Here, The State had the cart before the horse ... they attempted the impossible ... namely, to use Toppett, who professed no personal, direct line "eye-ball" view of Powers while she was in the store, to lay the foundation for both the monitor and tape recording equipment.

Toppett did not profess to have a factual basis to competently allow him to testify whether the monitor and taping equipment accurately showed Powers activities in the store ... because he did not personally see or observe her other than over the monitor ... and, accordingly, it was impossible for Toppett to testify whether the monitor and/or tape accurately showed Powers activities in the store.

Toppett, simply, had no personal direct "eye-ball" observation of Powers.

Therefore, The State could not possibly lay a sufficient foundation through Toppett's testimony to come within the rule that a lay witness can establish an adequate foundation for admissibility if the lay witness (a) personally observed the events as they in fact happened and (b) then testifies the videotape/monitor accurately depicts what he/she directly and personally saw first-hand. See, State v. Wahby, 775 S.W.2d 147, 154 (Mo. banc 1989)("Sutton testified that the tape he listened to prior to the hearing

was the tape he had made, and it accurately reflected the conversation that took place"); State v. Spica, 389 S.W.2d 35, 46 (Mo. banc 1965)("There was testimony that the motion pictures correctly portrayed what could be and was seen by witnesses"); Phiropoulos v. Bi-State Dev. Agency, 908 S.W.2d 712, 715 (Mo. App. E.D. 1995).

No trial witness claimed to have direct first-hand knowledge or direct first-hand observation of Powers in the Shop-N-Sav store. Therefore, there was no lay witness at trial who could satisfy the State's Exhibit 1 and State's Exhibit 1A foundational prerequisites.

Of course, the second way an adequate foundation can be made is through expert testimony that the monitoring/taping equipment was operating properly and accurately on the date of the crime. Id.

Here, there was no expert witness testimony.

Although Toppett testified the multiplex unit records all 16 camera views in "real time" (T1:177, lines 14-16), his testimony is unreliable because he based his speculative opinion merely by viewing the multiplex TV monitor without comparison of the TV monitor image with a personal simultaneous view of the actual event being recorded and shown on the monitor.

There was no evidence showing Toppett was qualified to testify as to the reliability, accuracy or trustworthiness of the multiplex recording unit or the security monitoring equipment.

In sum, a total failure to establish an adequate foundation for the admission of either State's Exhibit 1 or State's Exhibit 1A.

(3) Toppett's "Testing" Was Insufficient To Lay Proper Foundation :

Toppett's testimony was insufficient even to show the multiplex recording unit and/or monitoring equipment were in fact functioning in a normal or proper fashion on May 28, 2001.

Toppett said he "tested" the multiplex recording device when he came in May 28, 2001 by playing back about five minutes of the tape recorded May 27, 2001 and it worked (T1:177,186-187) ... but, Toppett was not present at Shop-N-Sav May 27, 2001 so he does not have personal knowledge whether the multiplex unit was functioning properly and accurately recording all events within surveillance camera-range (T1:186 line 1 through page 188 line 5).

And, significantly, since Toppett did not first-hand personally observe any of the May 27, 2001 (day before relevant crime) events, he was incompetent to testify the multiplex machine (recording and video) was operating properly ... all he can testify to is that the multiplex machine recorded some of the May 27, 2001 events which he observed on the multiplex TV monitor during the tape play-back.

In sum, Toppett was incompetent to opine whether State Exhibit 1 (or the multiplex monitor he viewed) accurately portrayed the Powers events as they in fact happened May 28 for a very simple reason ... he had no knowledge whether the recording/monitoring equipment was operating properly on May 28, 2001 and he didn't personally see the events first hand.

(4) Original Videotape Was Altered And Scenes Deleted in State's Exhibit 1A:

Fortunately, the testimony of Police Officer Mark Craig (T1:242 et seq) shows some of the deletions and alterations of the original videotape, State's Exhibit 1.

Officer Craig, on the night of the alleged incident, interviewed Powers in the Shop-N-Sav store security office and viewed the original videotape (State's Exhibit 1)(T1:244; T1:250-257).

Toppett testified he and his Shop-N-Sav supervisor Matt Schrader viewed State's Exhibit 1 and personally selected certain views of Powers to be dubbed onto State's Exhibit 1A (T1:192) ... other State's Exhibit 1 views, such as the view of Powers entering the Shop-N-Sav store with two men May 28, 2001, were not selected by Toppett/Schrader to be "dubbed" onto State's Exhibit 1A "because at the time those two were not involved" in Toppett's/Schrader's opinion (T1:204 line 21 through 206 line 21). This view was deleted.

Officer Craig testified State's Exhibit 1 showed Powers exiting Shop-N-Sav after her son activated the electric eye to open the exit door (T1:250-252) ... Toppett/Schrader did not select these views of Powers exiting the Shop-N-Sav store (with or without merchandise ???) to be "dubbed" onto State's Exhibit 1A. This view was deleted.

Toppett deemed these deleted State's Exhibit 1 views of Powers not important to the prosecution of Powers (T1:204 line 24 through 206 line 18).

Powers contends the scenes deleted from State's Exhibit 1 and not included in State's Exhibit 1A were prejudicial to her because these scenes represent probative, admissible evidence to *prima facie* establish Powers' defense (no intent to steal ... she

came to store to buy cold medicine for her son ... her son accompanied her to the store and waited outside ... the son had a medical emergency and summoned his mother [Sic: Powers] to leave the store and take him to a hospital ... Powers left the store, dropped the cold remedy items outside the door and was walking to her car with her son to take him to the hospital when she was apprehended by Toppett).

In any event, it was prejudicial err to admit State's Exhibit 1A into evidence because there were material changes, deletions and alterations of State's Exhibit 1 in State's Exhibit 1A all in violation of the foundational prerequisites under State v. Spica, 389 S.W.2d at 44 and State v. Wahby, 775 S.W.2d at 153.

(5) Conclusions Reply To Point I :

There should be no dispute The State failed to lay an adequate foundation for the admission of State's Exhibit 1 and State's Exhibit 1A under the rules established by this Court in State v. Wahby, 775 S.W.2d 147, 154 (Mo. banc 1989) and State v. Spica, 389 S.W.2d 35, 46 (Mo. banc 1965).

Here, the traditional foundation rules should not be blurred by our increasing dependence upon technology and its' claimed trustworthiness.

Just because a major retailer buys a video camera and video monitoring equipment ... and uses it ... does not mean the equipment, no matter how technologically "advanced", is reliable or trustworthy some or all of the time.

Here, legal mischief lurks and beckons like Oedipus sirens ... namely, without traditional proof, jumping to the determinative conclusion that the Shop-N-Sav multiplex monitoring/taping system was up and running properly on May 28, 2001, the

date of the alleged crime, merely because we are dealing with a so-called technologically advanced mechanical system.

We should not allow that to happen ... even "technologically advanced" systems should be subject to the traditional State v. Wahby, supra, foundational rules ... because they occasionally "crash" and report unreliably.

Under the traditional rules, the trial court prejudicially erred by admitting State's Exhibit 1 and State's Exhibit 1A because The State failed to lay an adequate foundation for admission.

Reply To Respondent's Brief Point II

The record shows The State had State's Exhibit 1 and State's Exhibit 1A in their actual possession, custody and control at least by March 20, 2002 (T1:193) and failed to disclose the same to Powers until six weeks later after commencement of trial May 1, 2002 ... and, then at a time and place where multiplex equipment was not available to discover the contents of State's Exhibit 1.

In State's Brief repeatedly states the "unavailability" of State's Exhibit 1 (i.e. due to multiplex format) "was not due to the state's fault" or the "bad faith on the part of the state". See, State's Brief, p. 18 ¶4, p. 21 ¶3.

This issue, of course, is relevant on the Best Evidence, Completeness and Brady Discovery Violation prejudicial err claimed at Appellant's Substitute Brief, Point II.

Powers' suggests The State, having State's Exhibit 1 and State's Exhibit 1A in its actual possession by March 20, 2001 ... and, then knowing State's Exhibit 1A did not

contain all the views of Powers shown in State's Exhibit 1 and that Powers could not view or show the jury State's Exhibit 1 due to its multiplex format ... did exercise "bad faith" and did intentionally make the content of State's Exhibit 1 "unavailable" to Powers by The State's failure to timely have all State's Exhibit 1 scenes of Powers "dubbed" onto a standard VCR videotape well before trial May 1, 2001 (as the selected portions of State's Exhibit 1 The State wished to use at trial were dubbed onto State's Exhibit 1A).

Reply To Respondent's Brief Point III

State's Brief, page 24 ¶2 attempts to avoid the hearsay rule with the conclusionary statement "Toppett's testimony was based on his personal observations and was not hearsay".

Of course, Powers vigorously disputes this conclusion. See, Reply To Respondent's Brief Point I, supra, which is hereby incorporated by reference.

Next, State's Brief cites State v. Teague, 64 S.W.3d 917 (Mo. App. S.D. 2003) ("Teague") as authority for its' contention that Toppett's testimony did not violate the Best Evidence Rule.

But, again, The State misconstrues its' cited authority.

In fact, Teague supports Powers position. In Teague, the court held :

"The best evidence rule applies to tapes as well ... In the instant case, Davidson, however, only became aware of the contents of the videotape when he watched the surveillance tapes the next day; therefore, his knowledge did not exist

independently of reviewing the tape. His evidence was only secondary evidence and not primary evidence ... It was a violation of the best evidence rule for the court to allow Davidson to testify as to the contents of the videotape". State v. Teague, 64 S.W.3d at 922.

Here, Toppett's testimony violated the Best Evidence Rule because the entire source of his information was secondary to the content of the taped monitor scenes contained in State's Exhibit 1 ... State's Exhibit 1 was the primary evidence.

Reply To Respondent's Brief Point IV

At Appellant's Substitute Brief pages 37-38 Powers argues The State failed to make a submissible stealing case because there was no evidence upon which the jury, beyond a reasonable doubt, could find Powers had an "intent to steal" the merchandise she abandoned immediately outside the Shop-N-Sav door in that the court cannot improperly "supply missing evidence or give The State the benefit of unreasonable, speculative or forced inferences". State v. Langdon, 110 S.W.3d 807, 811-812 (Mo.banc 2003).

State's Brief, page27 ¶4 through page 28 ¶1 counters by contenting an "intent to steal" inference is allowable from the fact that Powers placed the merchandise in a box instead of a shopping basket and that she left the store from an "entrance only" door without paying for the merchandise.

But, The State, again, misconstrues the record.

Toppett testified Shop-N-Sav is a "self bag store" and customers are provided two basic devices to use when shopping in the store ... a shopping basket for carrying "a couple of items" (such as the number of items Powers was accused of stealing) and a shopping cart "for bigger loads" (T1:215 lines 18-19; T1:213 lines 9-17).

At the time of the incident involving Powers, all the Shop-N-Sav baskets were in use so a customer was forced to use an empty box to carry the items (T1:212 lines 14 through 21).

Therefore, the fact that Powers was carrying items in a box raises no inference whatsoever ... because shopping baskets were not then available.

The door Powers used to exit Shop-N-Sav was typically used by customers to leave the store (T1:222 lines 15 -20). Toppett testified it was "not that extraordinary that she (Sic: Powers) goes out that door" because "people use that as an exit" (T1:224 lines 12-19).

Again, the door that Powers used to exit the main part of the Shop-N-Sav store cannot raise any criminal intent inference whatsoever.

Powers never exercised any personal control over the merchandise upon leaving the store ... she placed the items down immediately outside the door. See, Appellant's Substitute Brief, pages 37-38.

The cases cited by The State on the "abandonment" issue are not apposite.

State v. Bradshaw, 766 S.W.2d 470 (Mo. App. W.D. 1989) involved a situation where the defendant pulled out a shotgun and told the victim to turn over his wallet to

the defendant ... the victim complied ... the defendant looked through the wallet and threw it back to the victim stating "He don't have anything".

Bradshaw stands for the proposition that the "taking" (Sic: stealing) of property occurs when the wrongdoer assumes complete dominion and control over the property and that the return of the property post-taking does not vitiate the crime because the crime was already completed via the initial "taking".

The other case cited by State's Brief, State v. Cosby, 976 S.W.2d 464 (Mo. App. E.D. 1998), follows Bradshaw and stands for the same proposition.

Bradshaw and Cosby are distinguishable here because Powers never exercised complete control and dominion over the merchandise to the exclusion of the rightful owner, Shop-N-Sav.

Instead, Powers voluntarily abandoned and left the merchandise on Shop-N-Sav's property.

In sum, The State offered no substantial or competent evidence to show the essential "intent to steal" element of its charge, and, accordingly, the trial court committed prejudicial err by denying Powers Motion For Judgment of Acquittal.

III.

Conclusions

Based upon the facts, points, authorities and argument contained in this Substitute Reply Brief and Appellant's Substitute Brief Point I, Point II and Point III, the December 19, 2002 (LF:84) judgment should be reversed and remanded for retrial.

Based upon the facts, points, authorities and argument contained in this Substitute Reply Brief and Appellant's Substitute Brief Point IV, the December 19, 2002 (LF:84) judgment should be reversed and judgment of acquittal should be entered on both amended information counts.

Respectfully served, filed and submitted this 19th day of August, 2004.

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Rule 84.06(c) Certification

Pursuant to Rule 84.06(c) the undersigned hereby certifies this Substitute Reply Brief (a) contains the information required by Rule 55.03, (b) complies with the limitations contained in Rule 84.06[b] and (c) contains **3,657 gross words** (no exclusions) determined by The Microsoft Office 2003 Word computer program count (program used to prepare this Substitute Reply Brief).

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Certificate of Service

The undersigned certifies two (2) true copies of Substitute Reply Brief herein [together with one (1) 3 ½" computer diskette, scanned for virus and found to be virus free, containing the same] and this Certificate of Service were served August 19, 2004 by First Class U.S. Mail, postage prepaid, addressed to Respondent's legal counsel Missouri Attorney General Jeremiah W. (Jay) Nixon, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102 .

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